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No. 91-2052

In The

Supreme Court of the United States

October Term, 1992

THE FIRST NATIONAL BANK OF CHICAGO,
as Trustee of Institutional Real Estate Fund F,

Petitioner,

v.

THE COMPTROLLER OF THE CURRENCY
OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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The Brief in Opposition for the Respondent ("OCC") agrees with Petitioner that ERISA's requirement of prudent trust administration binds both the Trustee and the OCC. (ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)) But the OCC further contends that the court of appeals performed such an analysis. (OCC's Brief pp. 10-11). Such an analysis was *not* performed by the court of appeals or by the OCC. Neither recognized any need to harmonize ERISA with the National Bank Act, because each believed that under ERISA § 514(d), 29 U.S.C. § 1144(d), the National Bank Act simply overrides ERISA. This override

position violates *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), and other cases requiring harmonization of disparate federal statutory schemes, as this Court recently reiterated in *Patterson v. Shumate*, 112 S.Ct. 2242 (1992).

The Petition raises an important issue warranting review by this Court. A trustee needs to know whether adherence to OCC regulations "trumps" ERISA fiduciary law, however imprudent the trustee may deem such adherence to be, or whether ERISA's obligations of prudent investing must be balanced and harmonized with the National Bank Act, as required by this Court's precedents, including *Guidry* and *Patterson*.

If harmonization with ERISA is required, the OCC must explain, in a reasoned analysis, why it is justified in forcing compliance with OCC regulations that the Trustee has shown to be in conflict with ERISA's familiar prudence standards. The OCC did not even attempt this explanation; the court of appeals cannot and did not fill this gap.[1] Both the OCC and the court of appeals simply concluded that ERISA could never override an OCC regulation.

Permitting OCC regulations to "trump" ERISA would be especially anomalous since the purpose of OCC regulations is to permit national banks to exercise trust

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[1] The OCC's letter ruling of July 17, 1990 merely said that it found the Trustee's ERISA arguments "unpersuasive" (Pet. App. A45), and the court of appeals summarily concluded that "[t]here can be no violation of ERISA itself because that statute is explicit that it shall not be construed to invalidate or impair any federal regulation. 29 U.S.C. § 1144(d)." (Pet. App. A19).

powers. The hallmark of a trustee is prudent conduct, not mechanical obedience to fixed regulations. Congress rejected such mechanical obedience in passing ERISA in favor of "flexible" fiduciary standards. (Petition pp. 14-16).

This refusal to accept ERISA will cause trust beneficiaries undisputed injury, as demonstrated by the Trustee and its experts. The Trustee's unrebutted evidence is that millions of dollars of damage would be inflicted on trust beneficiaries if the OCC's regulations were adhered to, damage that would benefit no one and that could be avoided. The OCC's justification for inflicting this injury is its unsubstantiated conjecture that some unnamed participants might be benefited or harmed by the supposedly volatile nature of the properties the Trustee proposes to distribute. (OCC's Brief pp. 14-15). OCC conjecture cannot overcome unrebutted evidence, and this conjecture cannot justify inflicting enormous economic harm on the trust beneficiaries. Such proven harm should only be accepted if this is what Congress intended.

Actually, accepting the OCC'S position would frustrate the basic Congressional intent, repeatedly confirmed by this Court, to establish under ERISA a comprehensive and unified regime with flexible fiduciary rules for managing employee benefit plans, wherever their assets are invested. Endorsing the OCC's views strips all ERISA assets managed by national bank's of ERISA's protections. Such a marked diminution of ERISA's scope should only be countenanced after careful consideration of the two statutory schemes, as this Court required in *Guidry* and *Patterson*. The reader will search the court of appeal's

opinion in vain for this required analysis.[2] To fulfill this requirement, the Petition for a writ of certiorari should be granted and, if the Court deems it appropriate, the case should be remanded to the court of appeals for reconsideration in light of *Patterson*.

Respectfully submitted,

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[2] The OCC's brief also omits any response to Point II of the Petition, *i.e.*, that the OCC's interpretation of its own regulations was arbitrary and capricious and an improper amendment of the regulations under the Administrative Procedure Act. (Pet. pp. 21-24).